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8 **UNITED STATES DISTRICT COURT**
9 **DISTRICT OF NEVADA**
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11 PERRION PIPER,

12 *Petitioner,*

13 vs.
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15 DWIGHT NEVEN, *et al.*,

16 *Respondents.*
17

2:06-cv-01221-RCJ-GWF

ORDER

18 This habeas matter under 28 U.S.C. § 2254 comes before the Court on a motion (#12)
19 to dismiss by respondents as well as a filing by petitioner docketed as a motion (#22) for
20 expansion of the record. Petitioner has filed an opposition (#20) to the motion to dismiss and
21 the respondents have filed a reply (#21). The petitioner's motion (#22) for expansion of the
22 record in essence constitutes a surreply.

23 ***Background***

24 Petitioner Perrion Piper seeks to set aside his 2004 conviction of grand larceny and
25 burglary and his resulting adjudication as a habitual offender arising out of a theft from a
26 patron inside a casino in downtown Las Vegas, Nevada. The respondents' motion to dismiss
27 seeks dismissal of the petition in whole or in part, *inter alia*, on the basis that Ground One and
28 a portion of Ground Three are not exhausted. In the present order, the Court reaches only

1 the exhaustion issue. The Court defers any necessary consideration of the remaining issues
2 on the motion to dismiss until after, *inter alia*, the Court has acted on any request by petitioner
3 for dismissal or other appropriate relief with regard to the unexhausted grounds in response
4 to this order.

5 ***Governing Exhaustion Law***

6 Under 28 U.S.C. § 2254(b)(1)(A), a habeas petitioner first must exhaust his state court
7 remedies on a claim before presenting that claim to the federal courts. To satisfy this
8 exhaustion requirement, the claim must have been fairly presented to the state courts
9 completely through to the highest court available, in this case the Supreme Court of Nevada.
10 *E.g., Peterson v. Lampert*, 319 F.3d 1153, 1156 (9th Cir. 2003)(*en banc*); *Vang v. Nevada*, 329
11 F.3d 1069, 1075 (9th Cir. 2003). In the state courts, the petitioner must refer to the specific
12 federal constitutional guarantee and must also state the facts that entitle the petitioner to relief
13 on the federal constitutional claim. *E.g., Shumway v. Payne*, 223 F.3d 983, 987 (9th Cir.
14 2000). That is, fair presentation requires that the petitioner present the state courts with both
15 the operative facts and the federal legal theory upon which his claim is based. *E.g., Kelly v.*
16 *Small*, 315 F.3d 1063, 1066 (9th Cir. 2003). The exhaustion requirement accordingly insures
17 that the state courts, as a matter of federal-state comity, will have the first opportunity to pass
18 upon and correct alleged violations of federal constitutional guarantees. *See, e.g., Coleman*
19 *v. Thompson*, 501 U.S. 722, 731, 111 S.Ct. 2546, 2554-55, 115 L.Ed.2d 640 (1991).

20 Under *Rose v. Lundy*, 455 U.S. 509, 102 S.Ct. 1198, 71 L.Ed.2d 379 (1982), a mixed
21 petition presenting both exhausted and unexhausted claims must be dismissed without
22 prejudice unless the petitioner either dismisses the unexhausted claims or seeks other
23 appropriate relief.

24 ***Discussion***

25 ***Ground One***

26 In federal Ground One, petitioner alleges that he was denied effective assistance of
27 counsel because trial counsel failed to challenge the photographic identification procedure
28 used by the police as impermissibly suggestive.

1 On direct appeal, petitioner's appellate counsel included the following in the fast track
2 statement:

3 **I. The Appellant Cannot Argue the Due Process-**
4 **Suggestive Identification Issue in This Case**
5 **Because the Evidence Regarding That Issue**
6 **Was Never Presented to the Jury**

7 The Nevada Supreme Court has ruled that direct appeal
8 is not the appropriate procedure for raising issues related to
9 ineffective assistance of counsel. . . . But to place this appeal in
10 the proper context, the Appellant believes the Court must be
11 informed about the key issue in this case, *which should ultimately*
12 *come to the Court's attention by way of the post-conviction*
13 *habeas corpus procedure.*

14 #16, Ex. J, at 7 (citations omitted; bold emphasis in original; italics added). Appellate counsel
15 discussed the facts and law potentially supporting a due process violation arising from the
16 identification procedure used, but counsel acknowledged that the issue had not been raised
17 or preserved in the trial court. Counsel requested only that, if Supreme Court of Nevada
18 otherwise affirmed the convictions on direct appeal, the high court order the lower court to
19 appoint counsel to investigate the issue. *Id.*, at 7-9.

20 The Supreme Court of Nevada, in turn, expressly declined to consider any claim of
21 ineffective assistance of trial counsel in this regard on direct appeal:

22 Piper first contends that his trial counsel was ineffective for
23 failing to file a pretrial motion to suppress evidence obtained in an
24 unnecessarily suggestive photographic lineup. We decline to
25 consider Piper's contention. Claims of ineffective assistance of
26 counsel may not be raised on direct appeal, unless the claims
27 have already been the subject of an evidentiary hearing. In this
28 case, no such hearing was conducted. Accordingly, Piper must
raise his claim of ineffective assistance of counsel in the district
court in the first instance by initiating a post-conviction
proceeding.

#16, Ex. N, at 1 (citation footnote omitted).

Petitioner's state post-conviction petition included a claim of ineffective assistance of
counsel. However, the ineffective assistance claim did not include any allegation that trial
counsel was ineffective for failing to challenge the photographic identification procedure used
by the police as impermissibly suggestive. The petition included the underlying due process
claim, but it did not present an ineffective assistance claim in this regard. #16, Ex. O.

1 On the post-conviction appeal from the denial of the petition, petitioner included an
2 argument – for the first time in the post-conviction proceeding – that trial counsel had been
3 ineffective for failing to challenge the identification procedure as impermissibly suggestive.
4 #16, Ex. U (page numbers not legible).

5 The Supreme Court of Nevada, however, expressly declined to consider in the first
6 instance claims or facts that had not been previously presented in the state district court
7 proceedings below. #16, Ex. X, at 5 n.11.

8 The ineffective assistance claim in federal Ground One was not fairly presented to the
9 state courts for disposition on the merits and is not exhausted. Petitioner's arguments to the
10 contrary are not persuasive.

11 Petitioner first contends that the ineffective assistance claim was fairly presented to the
12 Supreme Court of Nevada in the fast track statement on direct appeal. However, presenting
13 a claim in a procedural context in which the merits of the claim will not be considered, or will
14 be considered only in special circumstances, does not constitute fair presentation of the claim.
15 See, e.g., *Castille v. Peoples*, 489 U.S. 346, 351, 109 S.Ct. 1056, 1060, 103 L.Ed.2d 380
16 (1989); *Roettgen v. Copeland*, 33 F.3d 36, 38 (9th Cir. 1994). As petitioner's appellate
17 counsel acknowledged on direct appeal, the ineffective assistance claim could not be heard
18 on the direct appeal and instead would have to be raised in a post-conviction petition. The
19 Supreme Court of Nevada further expressly declined to consider the claim on direct appeal.
20 Petitioner nonetheless urges that the claim was fairly presented on the direct appeal because
21 the state high court retained the discretion to review for plain error affecting substantial rights.
22 Even if this Court assumes, *arguendo*, that plain error review applies to ineffective assistance
23 claims on direct appeal under Nevada practice, it remains established law that a claim is not
24 fairly presented if it is presented in a procedural context where it will be considered only in
25 special circumstances. Petitioner did not fairly present the claim on direct appeal.¹

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28 ¹The same holds true with respect to raising the claim for the first time on the post-conviction appeal.

1 Petitioner further contends, *inter alia*, that exhaustion is not required if it is clear that
2 the state court would hold that the claim is procedurally barred.

3 In this regard, the Court notes that the standards for excusing a procedural default are
4 substantially the same in Nevada state court as they are in federal court. Accordingly, the
5 Court will not hold that this claim is exhausted in the absence of an unequivocal stipulation
6 by petitioner that Ground One in fact would be denied as untimely and/or successive if he
7 returned to state court to present the claim. Any holding of exhaustion on this basis further
8 will be subject to the State's ability to then move to dismiss the claim on the basis of
9 procedural default.² Such an unequivocal stipulation, to in truth be unequivocal in light of the
10 application of the procedural default rules under current Nevada state post-conviction
11 procedure, must include concessions that: (1) petitioner cannot avoid dismissal of the claim
12 in the state courts because he cannot demonstrate cause and prejudice in the state courts
13 to overcome these procedural bars;³ (2) petitioner cannot avoid dismissal of the claim in the
14 state courts because he cannot demonstrate in the state courts that the alleged constitutional
15 violation has probably resulted in the conviction of one who is actually innocent and cannot
16 thereby overcome these procedural bars;⁴ and (3) the procedural bars otherwise are now
17 consistently applied by the Nevada state courts, such that it is not possible that the state
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19 ²See *Morrison v. Mahoney*, 399 F.3d 1042, 1045-47 (9th Cir. 2005)(the State does not impliedly waive
20 the procedural default affirmative defense by not raising the defense in an initial motion to dismiss); *United*
21 *States v. Valdez* 195 F.3d 544, 548 (9th Cir. 1999)(similar). The Court notes that the Supreme Court recently
22 held that a district court could raise the federal time-bar defense *sua sponte* even after the State expressly
23 conceded in its answer that the petition was timely. See *Day v. McDonough*, 126 S.Ct. 1675 (2006). As a
general matter, the circumstances under which the limitation and procedural default affirmative defenses
must be raised by the State or can be raised by the district court *sua sponte* are the same for one defense as
they are for the other. See, e.g., *Herbst v. Cook*, 260 F.3d 1039, 1043 (9th Cir. 2001).

24 ³See, e.g., *Mitchell v. State*, 149 P.3d 33, 36 (Nev. 2006)(“A petitioner can overcome the bar to an
25 untimely or successive petition by showing good cause and prejudice.”); see also *Robinson v. Ignacio*, 360
F.3d 1044, 1052 n.3 (9th Cir. 2004)(recognizing that Nevada's cause and prejudice analysis and the federal
cause and prejudice analysis are nearly identical).

26 ⁴See, e.g., *Mitchell*, 149 P.3d at 36 (“Even when a petitioner cannot show good cause sufficient to
27 overcome the bars to an untimely or successive petition, habeas relief may still be granted if the petitioner
28 can demonstrate that ‘a constitutional violation has probably resulted in the conviction of one who is actually
innocent,’ citing *Murray v. Carrier*, 477 U.S. 478, 496, 106 S.Ct. 2639, 91 L.Ed.2d 397 (1986)).

1 courts, as a discretionary matter, would consider the claim despite the procedural default and
 2 despite a failure to demonstrate either cause and prejudice or actual innocence. In the
 3 absence of such concessions, the Court will not hold that there is no possibility that the
 4 unexhausted claim would be considered by the state courts in Nevada.

5 Petitioner's remaining contentions on the exhaustion issue similarly are without merit
 6 and/or beg the question as to the lack of exhaustion of the ineffective assistance claim.

7 Ground One is not exhausted.

8 ***Ground Three***

9 In federal Ground Three, petitioner combines an ineffective assistance of counsel claim
 10 with a due process claim. Petitioner alleges that the victim's testimony that she had won
 11 \$300.00 and \$400.00 jackpots on dollar slots at Binion's Hotel and Casino could not be
 12 truthful because the casino – according to petitioner – did not pay out such jackpots on dollar
 13 slot machines in the manner that she described or otherwise. Petitioner contends that he was
 14 denied effective assistance of counsel when his trial counsel failed to investigate and pursue
 15 this issue and that he was denied due process when the State failed to prove the required
 16 monetary amount element of grand larceny because the above supporting testimony was
 17 false.

18 Petitioner did not include any such particularized claim of ineffective assistance of trial
 19 counsel – as opposed to the due process claim – in his state post-conviction petition. He
 20 presents no argument specific to this ground seeking to establish that the ineffective
 21 assistance claim in federal Ground Three was exhausted. The ineffective assistance claim
 22 in Ground Three was not exhausted.⁵

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 25 ⁵On the post-conviction appeal from the denial of the petition, petitioner included an argument – for
 26 the first time in the post-conviction proceeding – under state Ground One that trial counsel had been
 27 ineffective for failing to investigate the jackpot payout issue. #16, Ex. U (page numbers not legible).
 28 However, as noted with regard to federal Ground One, the Supreme Court of Nevada expressly declined to
 consider in the first instance claims or facts that had not been previously presented in the state district court
 proceedings below. #16, Ex. X, at 5 n.11. As discussed previously, the presentation of a claim in a
 procedural context in which the merits of the claim will not be considered, or will be considered only in special
 circumstances, does not constitute fair presentation of the claim. See, e.g., *Castille v. Peoples, supra*.

1 The motion to dismiss therefore will be granted in part on the basis of exhaustion,
2 without prejudice to a renewed motion to dismiss on the remaining grounds after the Court
3 has acted on any request by petitioner for dismissal or other appropriate relief with regard to
4 the unexhausted grounds in response to this order.

5 In the petitioner's filing docketed as a motion (#22) for expansion of the record,
6 petitioner maintains that the respondents improperly have sought to have a "second bite at
7 the apple" by filing a reply to his opposition (which he characterized in error as a reply) to the
8 motion to dismiss. Petitioner confuses the answer and reply contemplated by Rule 5 of the
9 Rules Governing Section 2254 Cases with the briefing schedule on a motion to dismiss. On
10 a motion to dismiss, it is entirely proper for the respondents to file a reply to the petitioner's
11 opposition. See Local Rule LR 7-2(c). It instead has been petitioner who has sought to have
12 a second bite at the apple by filing an improper surreply to the respondents' reply. All
13 requests in #22 accordingly are denied and the improper additional filing will be disregarded.

14 IT THEREFORE IS ORDERED that the motion (#12) to dismiss is GRANTED IN
15 PART, as per the remaining provisions of this order, on the basis that the claims in Ground
16 One and the ineffective assistance claim in Ground Three are not exhausted. The Court
17 defers consideration of the procedural default and other issues raised in the motion.

18 IT FURTHER IS ORDERED that petitioner shall have thirty (30) days from the date of
19 entry of this order to file either:

- 20 (1) a motion for dismissal without prejudice of the
21 entire petition, for partial dismissal only of Ground
22 One and the ineffective assistance claim in Ground
23 Three, and/or for other appropriate relief; or
- 24 (2) an unequivocal stipulation that Ground One and the
25 ineffective assistance claim in Ground Three in fact
26 would be denied as untimely and/or successive if
27 he returned to state court to present the claims, in
28 which he expressly concedes that: (a) petitioner

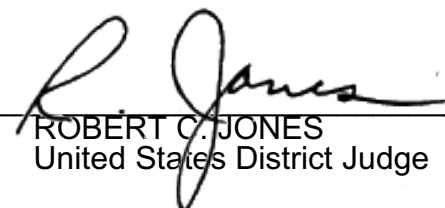
1 cannot avoid dismissal of the claims in the state
2 courts because he cannot demonstrate cause and
3 prejudice in the state courts to overcome these
4 procedural bars; (b) petitioner cannot avoid
5 dismissal of the claims in the state courts because
6 he cannot demonstrate in the state courts that the
7 alleged constitutional violation has probably
8 resulted in the conviction of one who is actually
9 innocent and cannot thereby overcome these
10 procedural bars; and (c) the procedural bars
11 otherwise are now consistently applied by the
12 Nevada state courts, such that it is not possible that
13 the state courts, as a discretionary matter, would
14 consider the claims despite the procedural default
15 and despite a failure to demonstrate either cause
16 and prejudice or actual innocence.

17 The entire petition will be dismissed without prejudice for lack of complete exhaustion if an
18 appropriate motion or other response is not timely filed.

19 IT FURTHER IS ORDERED that respondents may file a new motion to dismiss on the
20 basis of procedural default and/or other issues if the Court again orders a response to the
21 claims then remaining before the Court. The parties, if they wish, may incorporate their prior
22 arguments on the deferred issues in full from the present motion to dismiss.

23 IT FURTHER IS ORDERED that the petitioner's motion (#22) for expansion of the
24 record is DENIED.

25 DATED: November 20, 2007

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ROBERT C. JONES
United States District Judge